Supreme Court, U.S.
FILED
JUL 2 - 2009
OFFICE OF THE CLERK

No. 08-1482

IN THE

Supreme Court of the United States

TOMMY ZEKE MINCEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys,

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief.

in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 amicus curiae briefs each year on various issues in this Court and other courts. NACDL previously filed amicus curiae briefs in this Court in cases, like the present one, involving the validity of warrantless automobile searches under the Fourth Amendment. *See Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710 (2009) *and* 540 U.S. 963 (2003).

INTRODUCTION

As petitioner has clearly demonstrated, and as the courts of appeals have acknowledged, the circuits are deeply split in three ways on the issue of whether a person driving a rental car with the renter's permission but without the agreement of the rental company has a reasonable expectation of privacy in that vehicle. *See* Petition for Writ of Certiorari, 8 - 13. The purpose of this amicus brief is to highlight the importance of the matter on which the circuits are so divided. The operation of rented vehicles by so-called unauthorized drivers is common under any number of circumstances. A large percentage of the American population is likely, at some point in time, to find itself behind the wheel of a rented car or truck

without the direct imprimatur of the rental company. As the costs of car ownership impose a heavier financial burden, and as the limitations on authorized rentals continue to expand, the number of individuals driving rental cars with only the renter's permission is likely to grow. The issue of whether these drivers have a reasonable expectation of privacy is certain to recur with regularity.

Furthermore, given the increasing frequency with which individuals drive rental cars with only the renter's permission, as well as the increased reliance of the American public on this and other forms of the socially useful practice of car sharing, it would appear that society perforce recognizes the practice as reasonable. A necessary corollary of this general acceptance is the widespread assumption that those who operate cars (whether rented or not) with the operator's permission have a reasonable expectation of privacy just as owners and renters do.

ARGUMENT

I. AMERICANS RELY ON CARS, INCLUDING RENTAL CARS, TO FUNCTION IN SOCIETY

A. The Automobile is a Central Component in American Life

Over the course of the last century, almost every aspect of American life has been reshaped by an increasing dependence on the automobile. Our cities sprawl; our children move far away; our business is conducted by cell phone as we sit in traffic. The geography of our lives would be unrecognizable to a man or woman from the early 20th century, who

typically would have lived his or her entire life within a radius of 20 miles.

Today most Americans live far from their work sites, their schools, and their "local" shops. Networks of friends and families are scattered through other neighborhoods, cities, and states. The car has made this transformation possible, perhaps as its major catalyst. Public transportation is a very limited option for most Americans under most circumstances. Access to automobiles has become an inescapable necessity for navigating the landscape of modern American lives.

These statements find their most powerful support in the experiences of our daily lives; statistics and sociological studies abound to substantiate their truth. As just one example: every 5-10 years the U.S. Department of Transportation collects data throughout the nation on the travel behavior of the American public. The government conducts analyses of these statistics, and makes the data available for researchers to use in their own work. *See* U.S. Dep't of Transp., Fed. Highway Admin., Nat'l Household Travel Survey [hereinafter NHTS], *Guide for New Users*, *available at* http://nhts.ornl.gov/quickStart.shtml. One of the papers analyzing the data collected by the NHTS over the last 40 years confirms that the reliance of Americans on cars for work and all travel purposes is ever-increasing. John Pucher and John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transport. Q. 49, 49-50 (2003).

Indeed, as of 2006, 88% of American workers drove to their jobs. *Opportunity and the Automobile*, excerpted from Poverty & Race (January 1, 2006), available at http://www.highbeam.com/DocPrint.aspx

?DocID=1P3:1025134641. A majority of jobs are located in the suburbs, which are poorly served by mass transit. *Id.* Residents of inner cities with access to vehicles have been found to have access to an astounding 59 times as many jobs as those of their neighbors who are dependent on public transportation. *Id.* Car-less, low-income families who live in the suburbs – nearly half of all metropolitan poor – are even more isolated from available jobs. *Id.*

Likewise, immigrant households include a higher number of unskilled workers than non-immigrant families; and these workers generally must travel longer distances to work. *Travel Characteristics of New Immigrants*, NHTS Brief (2006), *available at* http://nhts.ornl.gov/briefs/Immigrant%20Travel.pdf. Immigrant households, however, have lower rates of vehicle ownership. *Id.*

Available data provide support for another fact that appears obvious – car ownership, vital as it is, is too expensive for many Americans. Although car ownership rates increase dramatically as incomes rise, 26.5% of low-income households cannot afford a motor vehicle. Pucher and Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transport. Q. at 55. When these households do own a car, that vehicle is often unreliable; the average age of vehicles in low-income households surveyed in 1995 was 10 years old, compared to 7.3 years old for other households. Elaine Murakami and Jennifer Young, *Daily Travel by Persons with Low Income* (Paper for NPTS Symposium, U.S. Dep't of Transport., 1997), *available at* http://nhts.ornl.gov/1995/Doc/LowInc.pdf.

Although lower-income Americans are less able to afford a car, in many ways they rely on automobiles

more than their more-fortunate neighbors and make most of their trips in privately-owned vehicles. Murakami and Young, *Daily Travel*, at 1. People in low-income households are also more likely to drive long distances than people in high-income households, who can afford to fly. *Long-Distance Travel*, NHTS Brief (2006), *available at* http://nhts.ornl.gov/briefs/Long%20Distance%20Travel.pdf.

For these segments of American society, car rental is an expedient and often necessary option by which they and their households can meet their transportation needs.

B. Pro Tem Car Rental is an Increasingly Viable Alternative to Car Ownership

When a car breaks down, its owner still has to get to work somehow. Even a person who can manage the usual routine without a car must sometimes travel outside the confines of public transportation to attend a wedding or funeral, see a doctor, or interview for a new job. When a household moves, items too large to fit in a trunk have to be transported. In all these instances and many more, a rental car or truck can be the best, even the only, option.

Studies conducted by the rental car industry show a steady growth. In 1998, with 1,644,000 cars in service, industry revenue was $17.2 billion. *2008 Market Data [U.S. Car Rental Market]*, Auto Rental News (2008), at 4, *available at* http://www.fleetcentral.com/resources/ARNFB09UScarrentalRevenue.pdf. By 2008, the number of cars in service had grown to 1,813,000, with revenues up to $21.88 billion. *Id.* These figures do not take into account the burgeoning membership in carsharing and short term auto use organizations. *See* Susan A. Shaheen,

et al., *North American Carsharing: A Ten Year Retrospective*, 2009 Transportation Research Board Annual Meeting (Nov. 15, 2008), http://76.12.4.249/artman2/uploads/1/UCD-ITS-RR-08-38.pdf. Nor do they include the numbers for the recently-developed and quickly growing Zipcar model of car rental. This new Zipcar system makes renting a car by the hour or day in the cities where the service is available. Zipcar, *Home*, http://www.zipcar.com/. The Zipcar website provides the following reasons, among others, why someone might want to rent one of its vehicles: 1) "I take public transit, but need a car sometimes"; 2) "I want to save money [over car ownership]"; 3) "I don't want the hassle of owning a car"; 4) "I want to do my part to take care of our planet"; 5) "Once in a while I need a second car"; and 6) "I need a big car for a big job." Zipcar, *Is a zipcar for me?*, http://www.zipcar.com/is-it/. For all of these reasons and more, reliance on rental cars is becoming ever-more firmly entrenched in American routine.

C. Authorization to Drive a Rental Car is Limited in Many Ways

A large percentage of rental car drivers, though, are bound to be unauthorized, at least in the view of the rental car company. Rental car contracts can be up to 63 pages in length, with a great deal of small print. Irma S. Russell, *Got Wheels?: Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 Loy. L.A. L. Rev. 135, 150-51 (2006). The typical contract will contain numerous circumstances and acts – such as driving the rental car outside of a delimited geographical area – which render the contract void and purport to cancel the driver's authorization. Most renters will not read the "terms and conditions" of rental in their

entirety, not only due to the length and complexity of the contracts, but also to the fact that they cannot change its terms and still rent the car. *Id.* at 149-51. A common condition of a car rental agreement is that the car may not be driven to and in another state; doing so voids the contract and converts the renter into an unauthorized driver.

The practices of rental car companies also exclude a notable percentage of licensed drivers from direct access to their rental vehicles. One area of exclusion is by age. To rent from National Car Rental, for example, the primary renter must be age 25 or older, with certain exceptions.[2] National Car Rental, *Age Requirement*, http://www.nationalcar.com/index.do?action=/itemDetails.do?HelpItemID=AGE. Other agencies such as Hertz allow people age 21 and over to rent their vehicles, but impose an additional charge of up to $27 per day for those customers between the ages of 21 and 25. The Hertz Corporation, *Minimum Age to Rent a Car*, https://www.hertz.com/rentacar/customersupport/index.jsp?targetPage=faqsRightNow.jsp&leftNavUserSelection=globNav_8_1. Rental companies therefore exclude at least all licensed drivers between ages of 16 and 21 and often impose a high fee for those between the ages of 21 and 25. Many young but fully licensed adults will therefore be left off of car rental contracts, but nonetheless will operate those vehicles with only the permission of the older adult who actually rents the car.

Enterprise Rent-A-Car, the car rental industry leader with 33% market share, requires a deposit on

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[2] In 2006, there were nearly 27 million licensed drivers under the age of 25. U.S. Department of Transportation, Federal Highway Administration, *Highway Statistics 2006*, http://www.fhwa.dot.gov/policy/ohim/hs06/htm/d122.htm#foot1.

all rentals which can be made only with a major credit card in the name of the renter. Enterprise Rent-A-Car Customer Service, *What payment method can I use to pay for my rental?* http://enterprise.custhelp.com/app/answers/detail/a_id/171/related/1. Once the rental car is returned, Enterprise will accept final payment of the rental charges made with a debit card or traveler's checks; however, the initial deposit must be made with a major credit card. *Id.* This policy effectively bars direct rentals by as many as one of four U.S. consumers who live without credit cards. LaRita Heet, *Some live without credit cards – could you? How and why 25 percent of Americans live a cash-only life*, CreditCards.com, Aug. 8, 2008, http://www.creditcards.com/credit-card-news/living-without-credit-cards-1267.php. Apparently, Enterprise and other rental car companies view the lack of a credit card as a sign that a renter is a credit risk, and may be less trustworthy to return the vehicle. Steve Holt and Connie Prater, *Renting a car with a debit card or cash? Expect to try harder*, Credit Cards.com, Updated July 2, 2008, http://www.creditcards.com/credit-card-news/rent-car-debit-credit-card-1276.php. It is predictable that many of those who lack credit cards, when needing to rent a car, will opt to ask a friend or relative with a credit card to obtain the vehicle, and then drive it with the renter's permission, rather than to apply for credit or go without the rental.

Finally, some families do not list additional drivers on the contract because the car rental companies charge extra for each driver beyond the initial customer. Others might plan to have only one person in the group do all the driving, but might run into unforeseen circumstances, such as sickness, injury or even mere fatigue. Another family might arrive at an

airport with little time, and send one driver to pick up the luggage, while the other driver rents the car alone.

No doubt, the restrictions and exclusions promoted by the terms and conditions of the contracts addressed above are intended primarily to protect the rental car companies' capital investment in their cars. One would expect a rental car company to take reasonable steps to protect its assets and the means by which it earns a profit. But should the companies' prudence in fiscal matters control when assessing the reasonableness of a driver's expectation of privacy in the rental car – whether the driver was authorized by the rental car company or by the authorized renter who initially rented the vehicle? After all, it would seem that the rental car company ceded its possessory interest in the vehicle upon renting it out. It would make little sense that a driver of a rental car who, for example, crosses a state line leaves behind his or her reasonable expectation of privacy at the border. Likewise, it does not seem logical for the reasonableness of a driver's expectation of privacy to hinge on whether the driver is 25 years of age or older or whether the driver has a major credit card. Because of the split of authority in the circuits, these and similarly important questions regarding societal views and the Fourth Amendment have not been uniformly answered.

II. UNAUTHORIZED DRIVERS WHO HAVE THE PERMISSION OF THE RENTER HAVE A SOCIALLY-RECOGNIZED REASONABLE EXPECTATION OF PRIVACY

The driver of the rental car in this case, petitioner Tommy Zeke Mincey, drove the vehicle with the permission of the renter. Indeed, Mincey's friend

rented it specifically for his use. He did not have the explicit authorization of the rental car company. No one claims he lacks a subjective expectation of privacy in the car and its contents. The open and, in our view, important question is whether society is prepared to accept Mincey's subjective expectation of privacy as reasonable, thus entitling him to contest the warrantless search of the car on Fourth Amendment grounds.

The Fourth Amendment to the United States Constitution provides the right of individuals to be free from unreasonable searches and seizures. U.S. Const. amend. IV. To have standing to challenge the legality of a search, an individual must establish (1) a subjective expectation of privacy in the place searched, and (2) that such expectation is one that society is prepared to recognize as reasonable. *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (relying on *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *see also Rakas v. Illinois*, 439 U.S. 128, 143-144, n. 12 (1978).

There is no set formula that will determine in all cases those expectations of privacy that society will recognize as reasonable. *See O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable."); *Ciraolo*, 476 U.S. at 220; *Oliver v. United States*, 466 U.S. 170, 177 (1984). Rather, the courts give weight to a number of considerations, including whether the activity in question serves functions recognized as valuable by society. *See, e.g., Carter*, 525 U.S. at 89; *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990); *United States v. Gamez-Orduno*, 235 F.3d 453, 458 (9th Cir. 2000);

United States v. Vega, 221 F.3d 789, 798 (5th Cir. 2000). For example, in *Minnesota v. Olson*, this Court held that individuals who stay overnight in other people's homes have a legitimate expectation of privacy because such stays are viewed as socially valuable. 495 U.S. at 98-99. The Court explained that:

> Staying overnight in another's home is a long-standing social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id. at 98.

Echoing this Court's social function analysis in *Olson*, 495 U.S. at 98-99, the Fifth Circuit in *United States v. Smith* emphasized that any Fourth Amendment standing inquiry should take into account what role the activity in question plays in society. 978 F.2d 171, 177 (5th Cir. 1992). In *Smith*, a defendant sought to suppress evidence derived from the interception of his wireless phone conversations. Although the defendant failed to show a subjective reasonable expectation of privacy, the court proceeded to address the second prong of the standing test. The court recognized the "vital role" the telephone plays in modern communication and the rapid growth of wireless technology. *Id.* at 177

(quoting *Katz*, 389 U.S. at 352). When making Fourth Amendment privacy determinations, the Fifth Circuit suggested looking to social utility and society's reliance on the activity in question in order to keep from inadvertently and unwisely stripping people of their privacy rights. *Id.*

Thus, in determining whether an individual's subjective expectation of privacy is one that society will recognize, the Court must consider whether the activity in question serves functions recognized as valuable by society. *Olson*, 495 U.S. at 98-99. As the statistics discussed above indicate, society greatly relies upon the automobile to satisfy both the everyday and extraordinary needs of individuals and families. Travel by means of a car is virtually essential for work, school and play – to meet our many familial and social obligations; to visit, to travel, and to recreate; to get to the many places and do the many things our diverse lives and society require of us. The sharing of vehicles, including rentals, is a custom and practice which is growing more and more common and which serves a function possibly as vital and valuable as car ownership itself.

As discussed, many drivers, especially in poorer communities, lack an established credit history or do not own credit cards. Many are under the age of 25. It is extremely difficult for them to rent vehicles. These drivers are often forced to seek the assistance of family members and friends when the need to rent a vehicle arises.

Courts recognize that the use of rental cars by unlisted drivers is a common practice in today's society. According to the Supreme Court of Florida, the use of rental cars by unauthorized drivers is "[i]n the very nature of modern automobile use." *Roth v. Old*

Republic Ins. Co., 269 So. 2d 3, 6-7 (Fla. 1972). The practice is "foreseeable," *id.*, and its frequency is "exceedingly great," *Motor Vehicle Acc. Indemn. Corp. v. Continental Nat. Am. Group Co.* 35 N.Y.2d 260, 264-65 (1974); *see also Thrifty Car Rental, Inc. v. Crowley*, 177 Misc. 2d 1021, 1023 (Sup. Ct. Albany County 1998) (referring to the use of rental cars by unlisted drivers as "a common scenario"); *State v. Cutler*, 159 P.3d 909, 912 (Idaho Ct. App. 2007) (acknowledging "the increasingly common utilization of rental vehicles for a myriad of purposes").

A rigid holding, like that of the Fourth Circuit below, that all unlisted drivers lack a legitimate expectation of privacy in rental cars effectively strips away basic Fourth Amendment protections from a sizeable and growing portion of society for little reason other than slavish adherence to the literal dictates of what can fairly be described as contracts of adhesion. *See generally People v. Alamo Rent A Car, Inc.*, 620 N.Y.S.2d 695 (1994) (granting petition to permanently enjoin rental agencies from refusing to rent automobiles to renters under age 25); *see also* Russell, *Got Wheels?: Article 2A, Standardized Rental Car Terms*, etc., 40 Loy. L.A. L. Rev. 135 (2006) (analyzing adhesive terms and possible unconscionability in rental car contracts). By contrast, the realistic approach espoused in *Minnesota v. Olson*, 495 U.S. 91 (1990), more reasonably addresses the social function or utility of a given practice, finding that similar arrangements between friends and family members are sufficiently valuable and useful that society is willing to accept them as reasonable.

In determining whether an individual's subjective expectation of privacy is reasonable, courts also consider the type and nature of the place searched and

the related expectation of privacy in such a place. *See, e.g., Carter*, 525 U.S. at 101 (Kennedy, J., concurring); *United States v. Crisp*, 542 F. Supp. 2d 1267, 1275 (M.D. Fla. 2008); *United States v. Gerena*, 662 F. Supp. 1218, 1237 (D. Conn. 1987). "Societal understanding" of what deserves "protection from government invasion" is key under the Fourth Amendment. *Oliver*, 466 U.S. at 178. While there is a societal understanding that a driver's privacy interest in his vehicle is less substantial than that in his home, the former interest is nevertheless important and deserving of constitutional protection. *Arizona v. Gant*, __U.S. __, 129 S.Ct. 1710, 1720 (2009); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *U.S. v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977).

With respect to rental cars, unlisted drivers' expectations of privacy are as reasonable as those of other drivers given traditional notions of privacy and societal understandings derived from communal norms. *See generally Mincey v. Arizona*, 437 U.S. 385 (1978); *Rakas*, 439 U.S. 128; *United States v. Oliver*, 657 F.2d 85, 87 (6th Cir. 1981). Like overnight guests, unlisted drivers do not have an ownership interest in the premises searched, but they do expect privacy. As many courts have recognized, the constitutional question of privacy should not be controlled by a lease agreement or subtle distinctions of landlord-tenant law, but by what society recognizes as acceptable and worthy of protection. *See generally United States v. Thomas*, 447 F.3d 1191, 1197-99 (9th Cir. 2006); *United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986); *United States. v. McClendon*, 86 Fed. Appx. 92, 2004 WL 68516, * 3 (6th Cir. Jan. 12, 2004) (holding that sublettors also have a legitimate expectation of privacy in their bedrooms even when such housing arrangements violate the tenant's rental agreement

with the housing authority). As sharing vehicles has become commonplace in society, so has using rental cars by unlisted drivers. The societal functions served by the practice are valuable. These functions should not be discouraged. Nor should this large segment of society that shares cars be denied Fourth Amendment protections because of "arcane distinctions developed in property and tort law." *See Rakas*, 439 U.S. at 143.

CONCLUSION

For the reasons explained above, the petition should be granted.

Respectfully submitted,

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July 2, 2009